No. 15,220

United States Court of Appeals

For the Ninth Circuit

GLEN EARL GRIGG,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellee.

Appeal from Judgment of the United States District Court for the Northern District of California, Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I. THIS ACTION WAS NOT PROPERLY REMOVED FROM THE STATE COURT TO THE UNITED STATES DISTRICT COURT.

The appellee bases the propriety of the removal of this action from the State Court to the United States District Court on the case of *Stamm v. American Telephone & Telegraph Co.*, 129 Fed. Supp. 719, and upon the case of *Southern Pacific Company v. Haight*, 126 Fed.2d 900.

In *Stamm v. American Telephone & Telegraph Co., supra,* the Court held that the removal of the action was improper and that plaintiff's motion to remand was good and the motion was granted and the cause

was remanded to the State Court. In that suit, plaintiff commenced an action in the State Court in Missouri. The plaintiff sued the American Telephone & Telegraph Company, a New York corporation, Western Electric Company, a New York corporation, and Richard H. Tatum, a citizen of Missouri, and later by amended complaint sued additionally Audivox, Inc., a Delaware corporation. The suit was commenced on January 27, 1953, and on March 3, 1955, the defendants, American Telephone & Telegraph Company and Western Electric Company, filed a petition for removal. The basis for their petition was that plaintiff was a resident of Kansas; A.T.& T. and Western Electric were corporations of New York and that Tatum, who was a citizen and resident of Missouri at the time of the commencement of the action, was in 1955 a citizen of the State of Pennsylvania and had not been served with process, and that therefore plaintiff had abandoned his action against Tatum; thus there was diversity of citizenship as to all persons. The defendant, Audivox, Inc., was not served with process. Upon the filing of petition to remove cause to Federal Court, the plaintiff filed a motion in the Federal Court to remand cause to State Court. The United States District Judge in granting the motion to remand to the State Court, stated at page 720 of the decision:

> "From the foregoing, it is evident that a joint cause of action was stated by the plaintiff (a citizen of Kansas), in the state court, against A.T.& T., Western (citizens of New York), Audivox (a citizen of Delaware), and Tatum, who

was then, and for more than six months thereafter, a citizen and resident of Missouri, but who, at the time of the filing of the petition for removal, on March 3, 1955, was a citizen and resident of Pennsylvania. Out of these facts the first question arises, as to whether diversity is shown.

"Petitioner-defendant, A.T.& T. and Western, contend that it is, saying that 'The removable character of a cause is determined as of the date the petition for removal is filed' and they cite Brown v. Eastern States Corp., 4 Cir., 181 F.2d 26, 28. That case clearly announces the law that a 'cause is not to be remanded if it was properly removable upon the record as it stood at the time the petition for removal was filed.' But how stood the record here at the time the petition for removal was filed? Does it not show that at the time of the institution of the suit the defendant, Tatum, was a citizen and resident of Missouri? *For nearly three-quarters of a century the law has been well settled that an action may not be removed from a state to a Federal court, on the ground of diversity of citizenship at the time of filing the petition for removal unless such diversity also existed at the time of the commencement of the suit.* Citing Gibson v. Bruce, 108 U.S. 561, 2 S. Ct. 873, 27 L. Ed. 825; Houston & Texas Central R. Co. v. Shirley, 111 U.S. 358, 4 S. Ct. 472, 28 L. Ed. 455; Akers v. Akers, 117 U.S. 197, 6 S. Ct. 669, 29 L. Ed. 888; Kellam v. Keith, 144 U.S. 568, 12 S. Ct. 922, 36 L. Ed. 544; Jackson v. Allen, 132 U.S. 27, 10 S. Ct. 9, 33 L. Ed. 249; Young v. Parker, 132 U.S. 267, 10 S. Ct. 75, 33 L. Ed. 352; Stevens v.

Nichols, 130 U.S. 230, 9 S. Ct. 518, 32 L. Ed. 914; Kraut v. Worthington Pump & Machinery Corp., D.C.N.Y., 1 F. Supp. 307. Thus, though defendant, Tatum, was not, on March 3, 1955, when the removal petition was filed, a citizen of Missouri, and had not been since August 8, 1953, the admitted fact is that he was a citizen of Missouri at the time of the institution of this suit, and, therefore, under the cases cited, diversity of citizenship does not exist, unless the plaintiff by some affirmative act of his has, meanwhile, abandoned or discontinued the action as to the defendant, Tatum, and that matter presents the next, and only remaining, question for consideration.

"It is quite well settled that if the plaintiff *voluntarily* dismisses, discontinues, or in any way abandons, the action as to the resident joint defendant, the cause then becomes removable, and may, upon prompt action, be removed by the nonresident defendants who have been served. (Citing cases.)"

The Court further held in that case that the mere failure to serve process on Tatum did not constitute a voluntary dismissal or abandonment of the action against him, and therefore the cause was not then removable.

The case establishes two fundamental points of law. First, it provides that a cause of action is not properly removable unless it is demonstrated that not only is there diversity of citizenship at the time of filing the petition for removal, *but also that it must appear that the diversity of citizenship existed at the time of*

the commencement of the suit. Secondly, the case stands for the proposition that there must be a *voluntary* abandonment as to the resident joint defendant or defendants before there can be a removal.

The complaint on file in the case at bar demonstrates that there was not diversity of citizenship existing at the time of the commencement of the suit. The complaint demonstrates a common domiciliary existing between the plaintiff and defendant, Harver Coon Gendel, at the time of the filing of the suit. Thus, a diversity of citizenship did not exist at the time of commencement of the action, and therefore the cases cited by the Court in *Stamm v. American Telephone & Telegraph Co.* indicate that the Federal Court was without jurisdiction in the case.

Further, there was no *voluntary* dismissal as to the defendant, Harver Coon Gendel. The record before the trial Court in the state Court demonstrates that the plaintiff was unable to effect service of process upon the defendant Gendel, and as a result the Court forced the dismissal. However, at that stage of the proceeding, there still existed in the case the six fictitious designated defendants. The plaintiff moved the Court to set aside the dismissal as to Gendel in order that plaintiff's counsel could serve process upon him and the fictitiously designated defendants. The record in this case abundantly shows that counsel for defendant, Southern Pacific Company, knew at least sixty days in advance of the trial date scheduled in the State Court that plaintiff had been unable to serve Gendel with process, and that plaintiff's counsel

had notified defendant's counsel that they would be required to dismiss the suit as to him because of their inability to effect service of process. The case of *Southern Pacific Company v. Haight,* 126 Fed.2d 900, distinguishes between a *voluntary* dismissal and a dismissal which is *in invitum.* In that case, at page 904, the United States Court of Appeals, Ninth Circuit, quoting from the case of *Berry v. St. Louis & S.F.R. Co.,* cited at 118 Fed. 911, stated in part as follows:

> "I am aware that the Supreme Court has held in many cases that for all the purposes of a suit, the cause of action is 'whatever the plaintiff declares it to be in his pleadings'; but the words so employed should be read in the light of the facts which were then presented for consideration. In those cases no subsequent condition arose outside of the pleadings which might fairly be said to operate as a voluntary abandonment by the plaintiff of the character of his action as first formally declared. There are also cases in which it is held that, where the defendant whose presence prevents a removal from a state court to a circuit court of the United States suffers a default, such condition does not give rise to a right of removal in the remaining defendant. And there are also cases in which the right to remove is denied when at the trial the court renders a judgment of dismissal against the defendant whose presence is incompatible with federal jurisdiction. But in neither of these classes of cases is the result due to the voluntary action of the plaintiff whose election controls the course and nature of the suit. The action of a court in dis-

> missing a defendant at the trial is in invitum, and is not the voluntary act of the complaining party. Nor is he responsible for a default suffered by a defendant whom he has sued jointly with others upon a joint cause of action."

In the *Southern Pacific v. Haight* case, the plaintiff had announced himself ready to proceed against Southern Pacific solely. In the Grigg case at bar, the plaintiff had merely notified the Court that he was unable to effect service of process upon the defendant Harver Coon Gendel, because the latter had apparently moved to Arkansas, and thereupon the Court entered a dismissal without prejudice as to that defendant. The Court and parties had not severed the action, nor elected to proceed against Southern Pacific solely, at the time the petition for removal was filed. Whether the plaintiff intended to serve employees of the Southern Pacific Company as such fictitious defendants or whether the plaintiff intended to dismiss as against said fictitious defendants had not yet been determined by the Court at the time the defendant Southern Pacific Company filed its petition for removal. Prior to the filing of the petition for removal, which was carried by hand from the courtroom of the State Court to the courthouse of the United States District Court, the plaintiff's counsel moved to have the dismissal against Gendel set aside. The Superior Court had jurisdiction at that stage of the proceeding to hear and determine the validity of its jurisdiction and to continue the trial of the action for a period of time commensurate with the

time required by plaintiff to serve process on the employees of the Southern Pacific Company residing in California.

The motion or petition to remove cause was made by Southern Pacific at least sixty days after knowledge having been imparted to them by plaintiff's counsel of their inability to serve defendant Gendel. It was made at the day of the scheduled trial of the cause in the State Court and for the obvious purpose of delay. The petition for removal was filed before the Superior Court had disposed of the question of the fictitiously designated defendants and of the motion of the plaintiff to set aside the dismissal and to continue the trial date.

This Court must view the *Southern Pacific Company v. Haight* case in the light of the circumstances which prevailed in that case. In that case, the plaintiff appeared in the State Court ready to proceed to trial, and because he had been unable to effect service of process on a co-defendant, it was dismissed as to that defendant. The Southern Pacific attorneys immediately petitioned to remove the cause to the Federal Court. A motion to remand the cause to the State Court was made by the plaintiff but denied by the District Court. The case then proceeded to trial in the District Court, and a judgment was made and entered in favor of plaintiff and against the defendant railway company for $18,500.00. After having instituted the removal to the United States District Court, the Southern Pacific Company then took the position in the United States Court of Appeals that their

petition of removal was improper and that the District Court had no power to try the case and the cause should have been remanded to the State Court.

The United States Court of Appeals therefore had before it a case wherein the defendant had caused it to be removed from the State Court to the Federal Court, and which case had then been tried in the Federal Court and in which the plaintiff had prevailed. It was then confronted with the position by the defendant that it should not have been removed in the first instance. The Appellate Court found there had been a severance of the cause and that there was the requisite diversity of citizenship and that therefore jurisdiction existed and the judgment for the plaintiff was affirmed.

The *Southern Pacific* case as to its facts is not in point with the Grigg case, since there were still matters before the State Court for determination, and because of the fact that no diversity of citizenship existed at the time of commencement of the action.

It is respectfully submitted that the United States District Court had no jurisdiction to try this case, and that this case should have been remanded to the State Court on the plaintiff-appellant's petition to remand.

II. APPELLEE-DEFENDANT'S STATEMENT OF FACTS IS ERRONEOUS.

The statement of facts at page 11-14 of appellee-defendant's brief is erroneous. The destination for

the two carloads of horses and mules is clearly stated on the way bills (Plaintiff's Exhibits 17 and 18) as being Santa Rosa, California. The testimony of Sigmund Fisher, employee of the Southern Pacific Company, demonstrates that no one accompanied the animals on the trip and no one signed a release to the railroad company of liability in accompanying the animals. (Tr. Rec. pp. 320, 321.) He further testified that no receipt had been signed by Mr. Coon for the animals when they arrived in Sacramento. (Tr. Rec. p. 321.) He further testified that when the animals were ultimately delivered in Santa Rosa, the company secured a receipt for delivery of them. (Tr. Rec. p. 322.) Further, Mr. Fisher testified that the company was paid for the shipment of the animals from Bakersfield, California, through to Santa Rosa, California. (Tr. Rec. pp. 291, 293.) Mr. Fisher further testified that the records indicate that when the horses and mules were transported from Sacramento to Santa Rosa, they were carried upon the said railroad cars in which they had arrived in Sacramento on December 16. (Tr. Rec. pp. 294-295.) He also testified that plaintiff's exhibits in evidence, numbers 17 and 18 (the way bills), were the only documents involved in the shipment.

While the Southern Pacific Company technically became the connecting carrier at Bakersfield, California, the feeding and rest records on the way bills of lading demonstrate that the last rest stop was made in Barstow, California, on December 14th at 3:20 A.M., and that on December 15th at 2:10 A.M.

the animals were reloaded and shipped from Barstow California. The records clearly indicate that after leaving Barstow on December 15 at 2:10 A.M., they proceeded to Sacramento some 412 miles distant, arriving in Sacramento on December 16 at 10:30 A.M., and that 32½ hours had elapsed from the time the horses left Barstow until they arrived in Sacramento. That under the twenty-eight-hour rule of the United States Code, the animals had to be removed in Sacramento for rest and feeding, as is required by law.

The record further indicates that upon their unloading in Sacramento, Mr. Anthony Perine, a Southern Pacific employee, notified his superior officers that the animals were in the Southern Pacific corral, and he made an entry in the official stock book of the Southern Pacific Company concerning the same. (Tr. Rec. pp. 118-119; Plaintiff's Exhibit 11 in evidence.)

As to the condition of the Southern Pacific corrals, the evidence is perfectly clear by the testimony of Sigmund Fisher that on the outside of the wooden corrals, but on Southern Pacific land, there existed a two-strand wire fence which Mr. Fisher testified to being a "makeshift wire fence" which had existed there for some time, but that he did not know how it got there. (Tr. Rec. p. 316.) Officer George Houcke also testified concerning the makeshift wire fence on the Southern Pacific property. He stated that there were not too many wires, and some of them sagged. Mr. Don Courtney testified that there was a makeshift wire fence on the Southern Pacific property out-

side of the corral extending from the corral out and along E Street and back to the corral. It was a two-wire fence in some places and a one-wire fence in other places *and that the fence had been put up by some horse traders some five years ago and had existed on the Southern Pacific property for some five years.* That Mr. Coon had patched it up in places. (Tr. Rec. pp. 256-260.)

There was a stipulation contained at page 266 of the record that there was no written authority in the files of the Southern Pacific Company authorizing Mr. Coon to feed the horses and mules.

The appellee's contention that the wire fence had been put up by Mr. Coon just prior to the accident is not supported by the record. The record demonstrates that the fence had existed on Southern Pacific property for five years, and Mr. Fisher testified to his knowledge of the existence of the fence.

The record conclusively demonstrates that employees of the Southern Pacific Company, and particularly Mr. Anthony Perine, knew that the fifty horses and mules had been taken out of the corral and placed on the Southern Pacific property within the makeshift wire enclosure. That this knowledge was expressly known to Southern Pacific employees at 10:00 A.M. and 4:00 P.M. on the day of the accident. The record conclusively demonstrates that the Southern Pacific employees did nothing to cause these horses and mules to be returned to the wooden corral. At the time said mules were being fed and grazed outside of the

wooden corrals and within the confines of the makeshift fence, the Southern Pacific Company employees knew that they were being held adjacent to public streets and roads, and that the makeshift fence was so constructed as to render it quite easy for the horses and mules to escape from the corral and along the public roads. That within an hour and a half of this knowledge, the mules were out on public roads. At that time Mr. Perine and Mr. Duke had been instructed by their superiors to go out and search for the mules and presumptively seek to return them to the corral.

That further, Mr. Duke and Mr. Perine did go out and search for the mules and did return same to the corral. They also sent the two dead mules to a reduction plant, advising the plant that the mules belonged to Southern Pacific Company.

As a factual matter the evidence demonstrates that the mules were in the care, custody and control of Southern Pacific. Further, as a matter of law, they were so controlled and possessed by Southern Pacific Company.

III. APPELLANT-PLAINTIFF'S REPLY TO DEFENDANT-APPELLEE'S ARGUMENT.

The defendant-appellee takes the position that even though the livestock may have been stopped in Sacramento for feeding and watering, "under tariff regulations the custody and possession of livestock while feeding, watering and resting shall be in the owner

and not the carrier." This regulation might be binding or effective as between the owner of the livestock and the common carrier, but it cannot preclude a third party stranger who was injured by those livestock from recovery against the carrier or the owner. In the first instance, the United States Code, 45 U.S.C., Secs. 71 and 72, requires a common carrier of livestock to maintain properly equipped pens in discharge of their duty of carriage. Obviously, the law was promulgated to preserve the property of the owner of the livestock, and was equally intended as a protection to the general public so as to require adequate restraint to prevent escaping livestock from damaging persons or property.

Further, while the tariff regulation might be construed as having some effect in an action between the owner of the livestock and the railway, the cases on the subject matter hold otherwise. In *Mering v. Southern Pacific Company,* 161 Cal. 297, it was provided that while an owner may agree to accompany livestock or care for them, this does not relieve the railroad from providing adequate feed, water and properly equipped pens for their resting and feeding. In 13 C.J.S., Carriers, Sec. 43, and the cases therein cited, it is provided that the pens or corrals provided by common carriers for hire for the maintaining of livestock *must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent animals from escaping therefrom, and the failure to fulfill this duty in this regard will render the carrier liable for loss or injuries sustained thereby.*

Further, at pages 35 and 36 of the Appellant's Opening Brief, there are cited a number of cases which provide that a railroad may not delegate its public duties. Implicit in these cases, and the substantative law, would be the proposition that the common carrier may *not* delegate its liability to the general public by simply providing that custody shall be in the owner while the livestock is in the company's pens. The case of *Los Angeles & S.L.R. Co. v. Umbaugh,* 61 Nev. 214, 123 Pac.2d 224, specifically held that the rule of nondelegation applies even when the Interstate Commerce Commission approves the delegation.

Thus, the tariff regulation 188-G relied upon so heavily by defendant, can have no application to third party strangers injured as a result of the escape of animals impounded by the common carrier, in the carrier's corrals.

The law is clear that the duty which a possessor of land owes to others to keep and maintain his premises in reasonably safe condition or to use his premises and property so as not to injure others is a nondelegable duty. See *Vazzoli v. Nance's Sanitarium,* 109 Cal. App.2d 232, 240 Pac.2d 672. It is generally the law under Civil Code Section 1714 that everyone is responsible for an injury occasioned to another by want of ordinary care in the management of use of his or their property. See *Jaehne v. Pacific Telephone & Telegraph Co.,* 105 Cal.App.2d 683, 234 Pac.2d 165.

In *Hubbard v. Matson Navigation Co.,* 34 Cal.App. 2d 475, 93 Pac.2d 846 (certiorari denied, 60 S. Ct.

975, 310 U.S. 628, 84 L. Ed. 1399) it was held that a contract between a carrier and a shipper, completely exonerating the carrier from liability for the negligent injury to goods carried by it, is void as being against public policy.

Following that doctrine to its logical conclusion, a statute or attempted tariff regulation seeking to relieve a property owner or carrier from liability to the general public for the use of its property would be void as against public policy. Civil Code Section 1714 provides as follows:

> "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill *in the management of his property* or person, * * *"

In *Porter v. Thompson,* 74 Cal.App.2d 474, the Court found both the cattle auctioneer and the owner of the property upon which the cattle were being auctioned as jointly liable for injuries sustained to a third person when the cattle jumped over the fence injuring that person.

In *Pschomy v. Brooks Market,* 60 Cal.App.2d 158, and a subsequent decision in 79 Cal.App.2d 556, the owner of property was held liable for use of the property by a prospective future tenant which use caused injury to a third person.

Under substantive law, an owner of land is liable for a negligent use of that land by himself or by a person whom he permits to use the land. Therefore,

a tariff regulation which provides that (as between a carrier and an owner of property being carried) custody is in the owner, cannot alter the duty of law imposed upon owners of property and their use of that property. While privity of contract may exist between the carrier and the owner of the livestock, so that such a regulation would be binding between the two, a duty of law exists on the part of the common carrier and owner of the property to see that their carriage is not negligent and to see that their property is used in a fashion which will not cause injury to third persons. The carrier may not allow his property to be used with his knowledge in such a manner that it will injure parties, and seek to disclaim liability under some contractual arrangement.

A typical illustration can be found in the operation of motor vehicles. The law places upon the owner of an automobile a statutory liability. If an automobile owner allows a person to use his car, and that person negligently operates or uses the car so as to injure third persons, both the owner and the operator are liable. The owner of the automobile may not delegate or disclaim his duty by contracting with the operator. The duty of the owner has been created by statute or by substantative rule of law, and that duty may not be transferred or disclaimed to the prejudice of third parties injured as a result of the use of the automobile.

In *Nichols v. Hitchcock Motor Co.,* 22 Cal.App.2d 151, 70 Pac.2d 654, it was expressly held that a party may not contract to exempt himself from liability

for the consequence of his negligence, if that party is charged with the duty of public service, and the contract relates to negligence in performance of any part of such duty to the public.

Thus, the Southern Pacific Company could not contract with the owner of livestock to exempt itself from negligence in the transportation of said livestock in such a way that their contract would be binding on the general public. Similarly, a tariff regulation seeking to declare that livestock in a common carrier's corral or pen is in the sole possession and control of the owner would be illegal if that tariff regulation was sought to be interpreted as meaning that the common carrier had no further duty to the public at large. While the regulation may be binding as pertains to injuries sustained by the animals (as between the owner of the animals and the carrier), it is not binding in so far as it relates to the livestock escaping and injuring members of the public. Neither a contract, regulation, or company rule could place the custody or care of livestock beyond the control of the carrier so as to exempt it from liability to the public at large. A carrier engaged in the transportation of livestock is required by law to maintain adequate pens and facilities for their care and control. If those pens and corrals are inadequate or if they are improperly used to the knowledge of the railroad (which was the case here) that carrier is liable to any member of the public injured as a result of said negligence.

The case of *Rutherford v. Reilly,* 104 Cal.App.2d 629, cited at page 15 of the defendant-appellee's brief, has been fully treated by the plaintiff-appellant at pages 42-45 of his opening brief. The case is not in point. That case involves a relationship of stable keeper—owner. The case at bar involves a common carrier for hire who is required by law to maintain adequate pens and corrals for the maintenance and control of livestock being shipped by that carrier. The *Rutherford* case did not involve the question of a nondelegable duty of a railroad but involved only the duty of a stable keeper bailee who had no notice of the negligence of the owner. In the case at bar, the railroad had actual knowledge of the negligent conduct in the feeding and grazing of the horses outside the wooden corral but within the so-called "makeshift wire fence" on the carrier's property. This condition existed continuously from 10:00 A.M. until the happening of the accident, was actually observed by S. P. Co.'s employees, but nothing was done to return the horses to wooden corrals.

At pages 20-22 of the defendant-appellee's brief, it is contended that there was "no evidence of any negligence in failing to provide adequate corrals." It is further contended that "there was no proof that the livestock escaped because of the inadequacy of the corrals."

Plaintiff's Exhibit 11 in evidence, being the stock record book of defendant company, demonstrates that Anthony Perine made an entry in that book as follows:

> "December 18, 1954, 5 P.M.: Consignee H. L. Coon. *Horses escaped from corral,* ran on Yolo freeway, and two killed by autos. Turned over to reduction. One had bad lacerations on the right shoulder when corraled.
>
> (signed) 'R.D.' "

Mr. Fisher testified that he in the past had observed a *makeshift* wire fence in the vicinity of the corral. Mr. Perine testified as observing the horses being fed two hours before the accident outside of the corral inside of the makeshift wire fence and only being watched by one man. Mr. Don Courtney testified that the makeshift wire fence *had existed for five years on the property of Southern Pacific* and that it was a poor fence and that the horses and mules could cross it if they wished to. (Tr. pp. 242-243.) Officer Houcke testified of examining the corral the morning following the accident and that the corral he saw was enclosed by wire and there were not too many wires and some of the wires sagged somewhat, and that there were numerous avenues from the corral to the highway upon which the mules could escape and reach the highway. (Tr. p. 195; pp. 200-207.) This evidence obviously meets the contention as to the adequacy of the corrals.

The Southern Pacific Company bases its entire case on the proposition that once the animals were placed in the Southern Pacific corral that the consignee, Mr. H. L. Coon, was immediately charged with the full and complete, care, custody and control of the animals, and that the Southern Pacific Company

had absolutely no liability of any kind or character thereafter. This position is asserted "to be the law" whether the animals were still in transit or whether they had reached their terminal point.

This argument completely ignores the general statement of law in Section 1714 of the Civil Code which charges responsibility to any person for the negligent management or use of his property. It ignores 45 U.S.C., Sections 71 and 72, and Section 422 of the Agricultural Code of California, both of which statutes require a carrier of livestock to provide properly equipped pens in its operations. Further, the contention ignores the substantive law found in Restatement of Torts, Section 318, and ignores the proposition of law set down in *Porter v. Thompson, supra,* and the substantive law acknowledged in *Pschomy v. Brooks Market, supra.* It further ignores the proposition of law stated in the cases at pages 35 and 36 of appellant's opening brief that the railroad may not delegate its public duties.

The law has long since established the general proposition that a common carrier is responsible for its negligence in the operation and conduct of its affairs. That the common carrier may not delegate these duties. Further, a landowner is liable for the negligent use of its land, whether by its own use or by the use of persons authorized to come on the land. The contention of the appellee-defendant therefore must be disregarded as not supported in law.

SUMMARY.

This case presents an extremely serious and important phase of law to the Court. It appears to involve a matter of first impression in so far as the fact situation exists. If the decision of the trial Court is allowed to stand, the general public shall be required to assume the peril as regards the care, transportation and confinement of livestock by railroads and other carriers. By the simply expedient of relying upon the tariff regulation, which actually involves a duty existing only between the carrier and the owner of the livestock, the public has been and will be without any protection or right when injured by escaping livestock. The carrier, in requiring an owner to feed his livestock in the carrier's pens, can by that simple expedient escape all liability, remove all duty of care on its part to the general public and still collect the profits accruing from the transport of livestock.

Today, the great development of urban areas and the increased shipment of livestock into those areas to feed and meet the necessities of the area, involves a substantial growing business. The carrier is engaged in the business for a profit. It can bring into urban areas, under the existing decision of the trial Court, large numbers of livestock with complete impunity and without any liability or duty of care and can still reap all of the profits from the transaction.

The ruling of the trial Court is harsh as to this plaintiff as well as the general public at large and

creates a false duty and responsibility. It authorizes a common carrier to engage in transportation and care of livestock for profit without any duty of care or responsibility on its part to the public.

It is respectfully submitted that such is not the duty intended by the legislature nor as is defined in the cases cited in the briefs of the appellant herein. The judgment of the trial Court should be vacated and set aside.

Dated, San Francisco, California,
March 6, 1957.

Respectfully submitted,

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